United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1475

To be argued by
LAWRENCE S. FELD

B P/S

IN THE

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—v.—

MAX KAVALER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR MAX KAVALER

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STATEMENT OF THE ISSUES

1. Should the substantive counts of the indictment be dismissed because the grand jury that returned the indictment was misled as to the nature and quality of the hearsay evidence which it heard concerning those counts?

2. Should the conspiracy count be dismissed because of the prejudicial "spill-over" effect of the tainted evidence presented in the grand jury and because the quality of the overall presentation of evidence to the grand jury respecting the defendant was defective?

3. Should a new trial be granted, in any event, because the trial jury was instructed that they could consider as proof of the conspiracy count certain of the defective substantive counts?

4. Was the defendant denied a fair trial by the prosecutor's decision not to correct the testimony of a key Government witness and his summation based on that testimony after discovering its falsity as to a material issue and to withhold the relevant facts from defense counsel and the District Court?

STATEMENT OF THE CASE

Preliminary Statement

Max Kavaler appeals from a judgment of conviction entered on September 29, 1976, in the United States District Court for the Southern District of New York, after a nine-day trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury, and from an order entered on September 24, 1976, denying appellant's motion for a new trial.

Indictment No. 76 Cr. 241, filed on March 11, 1976, contained 53 counts.* Count One charged the defendant with conspiracy (1) to defraud the United States by obstructing and hindering the Department of Health, Education and Welfare in administering the Medicaid Act (Title XIX of the Social Security Act) and (2) to violate Title 18, United States Code, Sections 287, 1001 and 1341 in violation of Title 18, United States Code, Section 371. Counts 2 through 27 charged the defendant with presenting false claims to the Government by causing to be submitted to the Department of Health, Education and Welfare allegedly fraudulent invoices for doctor's services rendered in connection with 26 identified patients in violation of Title 18, United States Code, Section 287. Counts 28 through 53 alleged that these same acts also constituted violations of Title 18, United States Code, Section 1001.

*Indictment 76 Cr. 241 superseded Indictment 76 Cr. 110, filed on January 29, 1976. The grand jury proceedings relating to these indictments, which form the basis for one of the principal issues on this appeal, are discussed more fully, infra, at pp. 8-23.

The trial commenced on July 19, 1976. Prior to submitting the case to the jury, the District Court dismissed 37 of the 52 substantive counts of the indictment.* On July 29, 1976, the jury returned a verdict of guilty on Counts 1, 2, 5, 6, 9, 10, 11, 15, 16, 18, 21, 22, 26 and 27 and acquitted the defendant on Counts 19 and 25.

On September 13, 1976, the defendant filed in the District Court a motion for a new trial based on newly discovered evidence. Following an evidentiary hearing held on September 17, 1976, Judge Brieant denied the motion on September 23, 1976.

On September 29, 1976, the District Court sentenced the defendant to concurrent terms of four years imprisonment on each of the counts on which he had been found guilty, pursuant to Title 18, United States Code, Section 4205(b)(2) which permits him to be immediately eligible for parole.

The defendant is at liberty pending this appeal.

Statement of Facts

A. The Government's Case

1. The Conspiracy Count

The Government's case-in-chief was presented through the testimony of six accomplice witnesses: Joseph Ingber and Sheldon Styles, both named co-conspirators,

*Counts 3, 4, 7, 8, 12, 13, 14, 17, 20, 23, 24 and 28-53. The District Court, with the consent of the Government, deleted the references in the conspiracy count to 18 U.S.C., §§1001 and 1341 and charged the jury that the alleged objects of the conspiracy were to defraud the United States and to violate 18 U.S.C., §287 in violation of 18 U.S.C., §371.

Jenniene Vetrano, Barbara Cupola, Arthur Krieger and Elliot Martin. The evidence, if believed, tended to show that, during 1968, Ingber and Styles, both chiropractors, were operating a clinic in Jamaica, Queens, and treating patients under the Medicaid program. Ingber and Styles began submitting to the New York State Department of Social Services invoices to which fictitious visits and chiropractic treatments were added [Tr. 29].* Early in 1969, upon Ingber's invitation, Dr. Kavaler began practicing at the Jamaica clinic.

Testimony was introduced that Dr. Kavaler allegedly soon joined Ingber and Styles in writing chiropractic treatment plans for Medicaid patients who had neither the described condition nor the need for the prescribed treatment. After the treatment plans were approved by the Department of Social Services, invoices were prepared and submitted detailing fictitious visits to the clinic by the patients.

In 1969, a second clinic was opened in Corona, Queens, and a third in Brooklyn, in both of which Dr. Kavaler was an equal stockholder with Ingber and Styles [Tr. 60, 67]. In late 1969, Dr. Kavaler was transferred to the Brooklyn, or "Galler" clinic and practiced there throughout the period charged in the conspiracy count. Testimony was introduced that these fraudulent practices

*"Tr." refers to the trial transcript; "App." refers to Appellant's appendix;

were allegedly carried on in all the clinics. In 1971, Dr. Kavaler "traded" his interests in two clinics for Ingber's and Styles' interests in the "Galler" clinic. [Tr. 80].

Cupola and Vetrano, clerk-receptionists at the Jamaica clinic, testified that they were instructed to draw fictitious treatment plans, based upon others prepared by the doctors, and false invoices [Tr. 348-368]. Krieger, a chiropractor at the Corona clinic, testified about conversations with Dr. Kavaler regarding these fraudulent practices [Tr. 434-436]. Martin, a podiatrist at the "Galler" clinic, testified to similar conversations [Tr. 494, 513, 555].

At the time of trial, Joseph Ingber was awaiting sentence after having plead guilty to a six-count information charging him with conspiracy to defraud the United States, making false claims against the United States, and mail fraud [Tr. 107-108]. In addition, Ingber admitted to destroying records, subor ng perjury and perjury, procuring false statements from witnesses and submitting thousands of false invoices [Tr. 113-114]. Sheldon Styles also was awaiting sentence after having plead guilty to the charges of conspiracy, making false claims, making false statements, mail fraud and income tax evasion. Styles, an unlicensed chiropractor, further admitted to practicing medicine without a license. Arthur Krieger was serving a

portion of a sentence of imprisonment imposed upon his plea of guilty to a two-count information charging him with conspiracy and filing false claims. Elliot Martin was serving a sentence of imprisonment imposed upon his plea of guilty to a two-count information charging him with making false statements and filing a false income tax return [Tr. 521-522]. Jenniene Vetrano had perjured herself before a Federal grand jury, later recanted and was told she would not be prosecuted if she thereafter testified for the prosecution [Tr. 373-374]. Barbara Cupola, another clerk-receptionist, testified under a grant of immunity [Tr. 424].

2. The Substantive Counts

The Government's case in regard to the substantive counts submitted to the jury consisted of the testimony of 15 patient-witnesses and various records. In substance these patients said that they had visited the clinics for chiropractic treatments fewer times than indicated on the pertinent invoices. The substantive counts dealt only with the patients treated at the "Galler" clinic and the "Lee Avenue" clinic, at which Dr. Kavaler also had practiced.

B. The Defense Case

Dr. Kavaler testified in his own behalf. He denied ever discussing false invoices with either Ingber or Styles [Tr. 991], or authorizing Vetrano or Cupola to submit false invoices for him [Tr. 991]. He further

denied ever "padding" any invoices, [Tr. 1023] or discussing this practice with Krieger or Martin [Tr. 1142-1144]. Dr. Kavaler testified that the invoices submitted accurately reflected the number of patient visits.

Dr. Sergio Allan, an internist at the Galler clinic, testified that he had never heard Dr. Kavaler suggest to anyone to prepare or file false invoices [Tr. 865-866] and corroborated Dr. Kavaler's testimony that Dr. Kavaler had terminated his relationship with Ingber and Styles because of their attempt to send Sheila Styles, Sheldon Styles' ex-wife, to the Galler clinic to write fraudulent paper [Tr. 866-867]. Rose Galler Levy, a shareholder of the Galler clinic, further corroborated Dr. Kavaler's testimony in this regard. [Tr. 831-833].

In addition, six individuals testified as character witnesses on behalf of Dr. Kavaler.

C. The Government's Rebuttal Case

The Government called Dr. Hamid Alizadeh and Ms. Gloria Silva as rebuttal witnesses. Since their testimony is fully discussed in Point II, infra, that discussion, for the sake of brevity, is incorporated herein by reference.

ARGUMENT

POINT I

THE SUBSTANTIVE COUNTS SHOULD BE DISMISSED BECAUSE THE GRAND JURY THAT RETURNED THE INDICTMENT WAS MISLED AS TO THE NATURE AND QUALITY OF THE HEARSAY EVIDENCE WHICH IT HEARD CONCERNING THOSE COUNTS. THE CONSPIRACY COUNT SHOULD BE DISMISSED BECAUSE OF THE PREJUDICIAL "SPILL-OVER" EFFECT OF THE TAINTED EVIDENCE. IN ANY EVENT, SINCE THE TRIAL JURY WAS INSTRUCTED THAT THEY COULD CONSIDER AS PROOF OF THE CONSPIRACY COUNT CERTAIN OF THE DEFECTIVE SUBSTANTIVE COUNTS, THE VERDICT ON THE CONSPIRACY COUNT WAS TAINTED AND A NEW TRIAL SHOULD BE ORDERED.

1. Introduction

A principal issue on this appeal arises from the conduct of the prosecution in presenting this case to the grand jury that returned the indictment upon which the defendant was convicted. Trial counsel in the court below made a timely motion to dismiss the substantive counts of the indictment on the ground that the grand jury had been misled as to the nature and quality of the hearsay evidence allegedly supporting these counts [App. 28-43, 44-77]. After reviewing the pertinent transcripts of the grand jury minutes and hearing argument from counsel, the District Court denied the motion without written opinion [App. 76-77].

On this appeal, we again urge that the substantive counts of the indictment were defective and should have been dismissed for the reasons set forth below. The conspiracy count should be dismissed as well because of the prejudicial "spill-over" effect of the tainted evidence presented in the grand jury and because the quality of the overall presentation of evidence to the grand jury respecting the defendant was totally deficient. We further submit that since the trial court's instructions concerning the conspiracy count permitted the jury to consider as proof of that count certain of the defective substantive counts, the verdict of guilty on the conspiracy count was tainted and that the defendant is therefore entitled to a new trial.

2. The Facts

The December 1974 additional grand jury which returned Indictment 76 Cr. 241, upon which Dr. Kavaler was tried and convicted, had previously returned Indictment 76 Cr. 110.* The superseding indictment, filed on March 11, 1976, added a number of substantive counts to the charges against the defendant contained in the prior indictment, filed on January 29, 1976.

The only testimony presented by the Government to support the substantive counts in both the original and superseding indictments was hearsay and double hearsay of two Government agents.

*On June 14, 1976, upon the Government's application, a nolle prosequi was granted as to Indictment 76 Cr. 110.

On January 29, 1976, Charles Kenher, an employee of the United States Department of Health, Education and Welfare assigned to assist the United States Attorney's office, Southern District of New York in the investigation of alleged Medicaid fraud, testified before this grand jury. He testified that during the course of the investigation he had reviewed evidence concerning invoices submitted by Dr. Kavaler. During his testimony the following colloquy occurred in regard to certain of the invoices which formed the basis of substantive counts in the indictment:

> "Q. Another interview was Carmen Irizarry, I-r-i-z-a-r-r-y. Is it a fact that she testified that she went to Lee Avenue Clinic and saw one chiropractor there about five or six times?
>
> A. She said she saw two chiropractors there for a total of about five or six times....
>
> Q. Another witness named Maria Colone [sic], how many times did she testify she saw Dr. Kavaler?
>
> A. She said at the most she saw him three times.
>
> Q. Was an invoice filed for treatment to Miss Colone [sic]?
>
> A. Yes. Dr. Kavaler submitted invoices for eleven visits within a 34 day period.
>
> Q. And she testified she didn't go to--never went to a chiropractor that often?
>
> A. That's correct." (emphasis added) [App. 476-477]

In fact, neither Irizarry or Colon had testified before the grand jury or in any other proceeding concerning

Medicaid invoices.* Not a single patient appeared before the grand jury [App. ?]. It is important to note that this misrepresentation to the grand jury was made on the same day the indictment was returned. Since the original indictment contained substantive counts relating to only four patients, Mr. Kenher's statement that two of these patients, Colon and Irizarry, had previously "testified" must have weighed heavily in the minds of the grand jurors who voted to indict Dr. Kavaler.

On March 11, 1976, the same grand jury heard the testimony of Agent Rena Morey, whose testimony, along with the evidence received on the first indictment, 76 Cr. 110, was the basis for Indictment 76 Cr. 241. The following colloquy occurred:

> "Q. Looking at Grand Jury Exhibit No. 160, is that a list of the names of the patients and the invoice numbers for those people that you've determined, based on either your interviews or the interviews of other people, who have not been seen by Dr. Kavaler the number of times indicated on the invoices reflected on that sheet?
>
> A. Um,--
>
> Q. Let me rephrase that: You've got a list in front of you of invoices and patient names?
>
> A. Yeah.

*The patients were merely interviewed by telephone by an investigator. No personal interviews of those witnesses were conducted during the grand jury investigation. No sworn statements were taken. The investigator's notes of the interviews were characterized by the Government as constituting "neither the verbatim or substantially verbatim statements of any witness, nor were any of the notes reviewed, adopted or approved by any witness." [App. 519].

Q. Those are patients that have been interviewed by you or other people in the United States Attorney's Office?

A. Right.

Q. And based on those interviews, have you concluded that the invoices listed next to the patients' names are false, fictitious and fraudulent in respect that there are more visits reflected on the invoices than patients actually had with Dr. Kavaler?

A. Yes, except with some of them, they weren't sure as to how many visits there were - just one or two - but they were sure they did not go as many as the times indicated." [App. 512-513].

In fact, the testimony at trial of three of the patient-witnesses plainly controverts Ms. Morey's grand jury testimony that these witnesses had been interviewed in the United States Attorney's office at any time before the indictment was filed [App. 85-87, 96-98, 116].

In effect, the grand jury was told on January 29, 1976 that two of the four patients whose invoices and treatment plans were under consideration had "testified" that they had received fewer treatments than the applicable invoices reflected. The grand jury promptly voted approval of Indictment 76 Cr. 110 that same day.

On March 11, 1976, the same grand jury heard sworn testimony that additional patients had been "interviewed" in the United States Attorney's office and that these additional patients also had received fewer treatments than indicated on the invoices. Again, the grand jury

voted approval of Indictment 76 Cr. 241 on the same day this "evidence" was presented.

3. The Law

The legal principles applicable here are well-known and do not require extended discussion. The Fifth Amendment to the United States Constitution provides as its first guarantee the protection of the grand jury.* As this Court emphasized in United States v. Estepa, 471 F.2d 1132, 1136 (2nd Cir. 1972), the framers of the Bill of Rights "were not engaging in a mere verbal exercise" when they provided the accused with this constitutional safeguard against oppressive prosecutorial conduct.

The grand jury's history and function has been most recently described by the Supreme Court in United States v. Calandra, 414 U.S. 338 (1974) and Branzburg v. Hayes, 408 U.S. 665 (1972). In describing the grand jury's historic functions and the broad nature of its investigative powers in its role as a "grand inquest", the Supreme Court said in Calandra:

> "Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions." (414 U.S. at 393; emphasis added).

*"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...." U.S. Const. Amend. V

The law is clear that the accused has a right "to have the grand jury make the charge on its own judgment". Stirone v. United States, 361 U.S. 212, 219 (1960). This substantial right, we submit, is transgressed by "any conduct of the prosecutor in the presentation of hearsay evidence that does not make clear to the jurors 'the shoddy merchandise they are getting so they can seek something better if they wish.'" United States v. Gallo, 394 F. Supp. 310, 314 (D. Conn. 1975) quoting United States v. Payton, 363 F.2d 996, 1000 (2nd Cir.) (Friendly, J. dissenting), cert. denied, 385 U.S. 993 (1966).

It is equally clear in this Circuit that the grand jury must not be misled as to the nature or quality of the evidence which it receives. United States v. Estepa, supra; United States v. Marquez, 462 F.2d 893 (2nd Cir. 1972); United States v. Leibowitz, 420 F.2d 39 (2nd Cir. 1969). However, that is unquestionably what happened here by (1) informing the grand jury that the patients had "testified" to fewer visits than indicated on the invoices when they had not so "testified"* and (2) informing the grand jury that

*The District Court, in response to the prosecutor's assertion that he did not mean to convey to the grand jury that the patients "testified in the sense of testifying at a hearing," [App. 70], stated:

> "In the context of the courthouse, certainly, that's what the word means. We have to remember that you are in there in the grand jury, and you have no adversary there and there's yourself and the grand jury members, for the most part laymen, and a court reporter. That's all. There you ought to be very meticulous in framing of questions. You say testified in that context, means testified. By that I mean taking an oath and stating something responsible while under oath. I don't see how you can use the word 'testify' there." [App. 70-71]

the patients had been "interviewed" at the United States Attorney's office when not all of the patients had, in fact, been so interviewed.

This Court, in United States v. Estepa, supra, unequivocally held:

> "...that, even though '[t]here is no affirmative duty to tell the grand jury in haec verba that it is listening to hearsay,' United States v. Malofsky, 388 F.2d 288, 289 (2nd Cir.), cert. denied, 390 U.S. 1017, 88 S. Ct. 1273, 20 L. Ed. 2d 168 (1968), the grand jury must not be 'misled into thinking it is getting eye-witness testimony from the agent whereas it is actually being given an account whose hearsay nature is concealed...' United States v. Leibowitz, 420 F.2d 39, 42 (2nd Cir. 1969)." 471 F.2d at 1136.

In United States v. Basurto, 497 F.2d 781, 785-787 (9th Cir. 1974) and United States v. Gallo, 394 F.Supp. 310, 315-316 (D. Conn. 1975) indictments were dismissed because the grand juries in those cases had been misled. In United States v. Basurto, supra, a named co-conspirator who testified before the grand jury, after the indictment had been filed, but prior to trial, informed the Assistant United States Attorney prosecuting the case that he had committed perjury in important respects in the grand jury. The Assistant did not take any steps to inform the grand jury of the perjury. The Court of Appeals, in reversing the judgment of conviction, declared:

> "Today, the grand jury relies upon the prosecutor to initiate and prepare criminal cases and investigate which come before it.

> The prosecutor is present while the grand jury hears testimony; he calls and questions the witnesses and draws the indictment. With that great power and authority there is a correlative duty, and that is not to permit a person to stand trial when he knows that perjury permeates the indictment." 497 F.2d at 785.

In United States v. Gallo, supra, the prosecutor in seeking a second indictment to correct errors contained in the first, submitted transcripts of the testimony of a witness who had appeared before the first grand jury to a second grand jury. This witness had perjured himself and later had recanted before the first grand jury. The prosecutor made no mention of this to the second grand jury. District Judge Zampano ruled that the second indictment based upon such false testimony would not be permitted to stand.

While we do not claim that the evidence establishes that Government counsel who presented the case to the grand jury consciously permitted the jurors to consider testimony which the prosecutors knew to be false, as occurred in Gallo, the record below, nevertheless, incontrovertibly demonstrates that the grand jury heard materially inaccurate testimony from Government agents who were the only witnesses who testified concerning the substantive counts. Irrespective of whether the prosecutors acted in bad faith or not, the hard, indisputable fact is that the grand jury was misled and was induced to rely on hearsay and double hearsay by representatives of the Government whose testimony was substantially erroneous.

What is the value of reminding grand jurors that they are receiving hearsay testimony when the witnesses who appear in the grand jury solemnly, but fallaciously, assure the jurors that the persons having personal knowledge of the relevant facts involved have "testified" about those facts and have been interviewed, presumably by Government investigators, in the United States Attorneys' office? Surely, a grand juror, during a long investigation, cannot be faulted in relying on such representations and not demanding that the patients themselves be produced. But when, as here, such representations are inaccurate, in material part, the grand jury is deceived, and "the waters of evidence" become "poisoned". United States v. Gallo, supra, 394 F. Supp. at 315.

In the present case, there was no competent, independent evidence before the grand jury to sustain the substantive counts of the indictment. Thus, cases such as United States v. Harrington, 490 F.2d 487, 490 (2nd Cir. 1973) where there was enough valid, independent evidence to support the indictment, are inapposite. That the grand jury heard testimony from Ingber and Styles about the defendant is certainly of no significance, for, as trial counsel for the defendant correctly observed below, the only issue with respect to the substantive counts was whether or not the particular invoices involved were false, and neither Ingber nor Styles could prove

that they were false or not. Indeed, neither witness identified a single invoice when testifying before the grand jury [App. 69-70].

To understand the critical significance of the erroneous evidence on which the grand jury relied, it is necessary to review the sequence of events concerning the filing of the two indictments. In the original indictment, 76 Cr. 110, the ten substantive counts alleging violations of Title 18, United States Code, Sections 287 and 1001 involved only four patients: Rose Echevarria, Maria Colon, Beatrice Lee and Carmen Irizarry. Kenher's sworn testimony that two of these patients - Colon and Irizarry - had "testified" previously was untrue and occurred on January 29, 1976, the very day that the grand jury filed the indictment.

Thereafter, the Government decided to obtain a superseding indictment against Dr. Kavaler which would expand the number of substantive counts from ten to fifty-two. Nevertheless, instead of calling the patients themselves before the grand jury, the prosecutors again chose to adduce the evidence to support these counts by having a Government investigator provide hearsay and double hearsay testimony to the grand jury. This time Agent Rena Morey was selected to testify before the same grand jury which had previously heard Kenher. Instead of attempting to use this opportunity to correct the misleading evidence pre-

viously presented by Mr. Kenher, the Government's attorney compounded the error committed on January 29th by eliciting from Ms. Morey that the patients whose names appeared on a certain grand jury exhibit had previously been interviewed by her or other people in the United States Attorney's office, a fact which was subsequently controverted by three of the patients when they testified at trial.* The grand jury, after hearing Ms. Morey's testimony on March 11th, again dutifully filed the superseding indictment that same day.

On the record before this Court it is simply beyond dispute that the Government misled the grand jury as to the nature and quality of the evidence supporting the substantive counts and that the basis for these counts was therefore tainted.

The influence of the United States Attorney's office on a federal court's grand jury may be substantial, but is not a license to mislead. Cf. United States v. Hilton, 534 F.2d 556, 565 (3rd Cir. 1976). The remedy for

*Beatrice Lee testified at trial that she was first contacted by telephone in January, and that her first interview at the United States Attorney's office occurred three to four weeks before she testified at trial on July 22, 1976 [App. 86-87]. Herman A. Pas testified that he had received a telephone call about six or seven months before he testified at trial and that he had no other contacts with Government representatives until a week before he was called as a witness at trial [App. 96-97]. Rosa Rodriguez testified that she first had been interviewed by Ms. Morey in the United States Attorney's office about two months before she testified at trial [App. 116].

the conduct that occurred in this case is clear. When "the integrity of the judicial process" has been endangered, as here, reversal with instructions to dismiss is required. United States v. Leibowitz, supra, 420 F.2d at 42; United States v. Estepa, supra, 471 F.2d at 1137; United States v. Gallo, supra, 394 F. Supp. at 314. The observation of the Supreme Court in Mesarosh v. United States, 352 U.S. 1, 14 (1956) is equally apt here:

> "This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted." (footnote omitted).

In Estepa, this Court reversed with instructions to dismiss the indictment because prosecutors in this Circuit had been repeatedly warned that dismissal would result if they continued to mislead grand juries as to the hearsay nature of the evidence before it. 471 F.2d at 1137; United States v. Ramirez, 482 F.2d 807, 811 (2nd Cir.), cert. denied, 414 U.S. 1070 (1973) and the cases cited therein. Moreover, this Court has repeatedly cautioned against the unnecessary use of hearsay testimony in the grand jury. Id. at 811, n.3. Nevertheless, the practice continues. See United States v. Burse, 531 F.2d 1151, 1155-56 (2nd Cir. 1976).

In the present case, not only was this admonition ignored, but the grand jury was induced to rely on hearsay and double hearsay by false assurances of the Government's witnesses. This Court must not condone such conduct by "yet another admonition". United States v. Estepa, supra, 471 F.2d at 1137. The substantive counts should be dismissed.

While the conspiracy count may arguably have been supported by adequate, independent non-hearsay evidence in the grand jury, we respectfully submit that it too should be dismissed. Dismissal is mandated not only because of the prejudicial "spill-over" effect of the tainted evidence, but because the quality of the overall presentation of evidence to the grand jury respecting the defendant did not comply with even minimally acceptable standards.

In any event, the conviction under the conspiracy count must be reversed and a new trial must be granted as to that count because the trial court's instructions permitted the jury to consider certain of the tainted substantive counts as proof of the conspiracy charged in Count One. The District Judge, over trial counsel's objection [App. 191-196], charged the jury, in pertinent part, as follows:

> "The government need not prove that the conspiracy achieved its goal. However, proof concerning the accomplishment of the objects of a conspiracy may be the most persuasive

evidence of the existence of the conspiracy itself. Successful venture, if you believe it was successful, may be regarded as proof of the existence of the agreement.

"In this regard, I caution you that those substantive counts concerning claimed false invoices at Lee Avenue, that is, Counts 15 and those with numbers higher than 15, are not related to or claimed to be in furtherance of the conspiracy charged in Count 1. Also, if the conspiracy, if there was one, ended on March 23, 1971, then the substantive counts numbered between 2 and 14, inclusive, were not in furtherance of or related to the alleged conspiracy. There is no need for the government to show any relationship between the substantive charges and the conspiracy. Each count, as I said to you earlier, must be treated as a separate matter, to be separately decided by you and there may be no conviction on any count unless as to that count each element of the alleged crime is proved to your satisfaction beyond a reasonable doubt. But, unless the evidence indicates that the conspiracy continued beyond March 23, 1971, you cannot consider the Galler Medical Clinic substantive counts as bearing directly on the conspiracy or the furtherance of it. As to Lee Avenue counts, you may not consider them as being in furtherance of the conspiracy." [App. 231-232]

Since there is no way to determine whether the jury did, in fact, consider the Galler Clinic substantive counts as "most persuasive evidence of the existence of the conspiracy itself", the conviction on the conspiracy count must be reversed if the substantive counts fail.

In sum, we submit that the defendant was prejudiced by the trial court's instruction and by the "spill over" of the tainted substantive counts which may have influenced the jury's consideration of the conspiracy count. United States v. Febre, 425 F.2d 107, 114 (2nd Cir. 1970) (Hays, J.,

dissenting), cert. denied, 400 U.S. 849 (1970); United States v. Olvera, 523 F.2d 1252, 1253 (5th Cir. 1975); United States v. House, 524 F.2d 1035, 1045 (3rd Cir. 1975), petition for cert. filed, (U.S., July 27, 1976).*

POINT II

THE DEFENDANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY THE PROSECUTOR'S DECISION NOT TO CORRECT THE TESTIMONY OF A KEY GOVERNMENT WITNESS AND HIS SUMMATION BASED ON THAT TESTIMONY AFTER DISCOVERING ITS FALSITY AS TO MATERIAL ISSUE AND TO WITHHOLD THE RELEVANT FACTS FROM DEFENSE COUNSEL AND THE DISTRICT COURT

At trial, Dr. Kavaler introduced a diary containing entries corresponding to the dates of patients' treatments at the Lee Avenue clinic [App. 153-154]. These entries corroborated Dr. Kavaler's testimony that he, in fact, had treated the patient-witnesses as indicated on the submitted invoices. The first entry in this diary was on February 10, 1971 and the last on May 27, 1971 [App. 189]. In response to a question asked of Dr. Kavaler on the Government's voir

*We urge, in any event, that since the defendant received concurrent sentences on the conspiracy and substantive counts and since the fact of conviction on both might have affected the sentences imposed on each, the case should be remanded for reconsideration of sentencing on the conspiracy count. United States v. Sperling, 506 F.2d 1323, 1343 (2nd Cir. 1974), cert. denied, 420 U.S. 962 (1975), and cases cited therein.

dire examination of the diary as to why the diary ended with a May 27, 1971 entry, Dr. Kavaler stated that he had not worked at the Lee Avenue clinic past that date [App. 190].

The Government, in rebuttal, called Dr. Hamid Alizadeh and Gloria Silva to impeach Dr. Kavaler's testimony that he had not worked at the clinic past May 27, 1971, and to demonstrate that the diary was a recent fabrication. Dr. Alizadeh, the administrator of the Lee Avenue clinic, identified records of the clinic which, if believed, tended to show that the clinic received payments from Dr. Kavaler until January 1974 [App.125]. On cross-examination, Dr. Alizadeh admitted that he had no actual recollection of Dr. Kavaler working at the clinic after 1971 and that the payments did not necessarily indicate that Dr. Kavaler had worked there after 1971 [App.128 -130].

Gloria Silva, the office manager at the Lee Avenue clinic, authenticated these records. She was the final witness heard by the jury in the case. On her direct examination by the prosecutor, the following colloquy occurred:

> "Q. When do you recall was the last year you saw him?
>
> A. The last time I saw him?
>
> THE COURT: The last time you saw him treating patients is what the question was.
>
> A. I'm not too sure, '73, '72.
>
> Q. '72 or '73?

A. Yes.

Q. The last payment you saw was January of '74, do you remember him treating patients then?

A. Could be." [App. 149] (emphasis added)

On cross-examination, Gloria Silva testified as follows:

"Q. You said could be, are you positive under oath that you saw him in 1973?

A. Yes, I did.

Q. And in '72?

A. '72 possibly.

Q. And '71?

A. '71, I did.

Q. You saw him in '71." [App.151]

The unmistakable impression conveyed to the jury by her testimony was that Dr. Kavaler had been working at the Lee Avenue clinic after May 27, 1971, that Dr. Kavaler had lied to the jury when he had testified in his own defense and that the diary was a recent fabrication. The Government, in summation, stressed just that:

> "You recall the book for Lee Avenue, Defendant's Exhibit AC, which was apparently lost from the first subpoenas, January, 1972, December, 1974, and found some time after that and was not turned over with a subpoena back in July because Dr. Kavaler made the decision this didn't apply to patients.
>
> "What do we have? We have a book which has patients which begin on February 10, 1971, and end on May 27, 1971. The counts begin March 31, 1971, and end on May 7, 1971. Dr. Kavaler testified when he was asked why was this so short that well, he didn't work at Lee Avenue after May of 1971.

"You heard the testimony of Dr. Alizadeh and his secretary, Mrs. Silva, they were receiving rent payments from him as late as January, 1974, and it was their best recollection that he worked there as late as December, 1973, and Mr. Esbitt has suggested to you, and will doubtless continue to suggest, that Dr. Kavaler was making rent payments for other people because he had these relationships with them where they were working for him really.

"Also in evidence are the rent pages from these other doctors and you may inspect them and compare the dates and you may find from looking at these that they all made their own rent payments and the rent payments on Dr. Kavaler's sheet are Dr. Kavaler's rent payments because he worked there until late 1973. There is evidence of Dr. Kavaler's attempt to falsely explain why this record ends just a month -- less than a month -- after the last substantive count in the indictment." [App. 198-199](emphasis added).

On September 13, 1976, trial counsel filed a motion for a new trial in the District Court. Judge Brieant conducted a hearing on the motion on September 17, 1976 at which Gloria Silva, Dr. Alizadeh and George Wilson testified.

At the hearing, Ms. Silva testified that after her appearance on July 27, 1976, she returned to her office with Dr. Alizadeh. During the cab ride back to her office she mentioned to Dr. Alizadeh that she thought she had made a mistake in her testimony concerning the years during which she had seen Dr. Kavaler working at the clinic. The next morning, July 28, 1976, she called her own attorney who told her that if she felt she had made a mistake, she should return and see the judge.

That same morning, she returned with Dr. Alizadeh to the courthouse. In the courthouse lobby they met the Government agent, Mr. John E. Hartwig, who had driven them to court on July 27, 1976, and explained the situation to him. The agent brought them upstairs to the witness room.

When Assistant United States Attorney George Wilson joined them, Ms. Silva told him that she wanted to change what she had said during the trial. She stated that she felt she had made a mistake, that Dr. Kavaler had not worked at the Lee Avenue clinic during 1972 or 1973 and that some other doctor had been working there at that time [App. 333-334]. She further stated that she wanted to see the judge [App. 382]. Mr. Wilson replied that he had never asked her whether Dr. Kavaler had been working at that clinic during those years. He said that he had asked her whether she had seen the defendant during 1972 and 1973, to which she responded,"[y]es,I did see him in '72 and '73, about maybe that time, but he wasn't working". [App. 334]. According to Ms. Silva, Mr. Wilson then showed her a transcript containing her questions and answers and that the question about Dr. Kavaler working at the clinic did not appear in the questions and answers she read. In explaining why she left without seeing the judge, Ms. Silva stated on cross-examination:

"Well, when I came back and I saw in the book it wasn't the way -- the question wasn't put the way I thought it was, though someone had asked me that question some time, otherwise it wouldn't have been in my mind. Someone did ask me did he work in '72 and '73, and I think I said yes, which was wrong. That is all I came up --" [App. 347]

At this same meeting, Ms. Silva also explained to Mr. Wilson that if he examined the records that she had authenticated at trial, he would probably see another doctor's name next to Dr. Kavaler's payment. This notation, she said, indicated that these payments had been made for reasons other than Dr. Kavaler's having worked at the clinic.

At the post-trial hearing, Ms. Silva stated that during her trial testimony, she had been confused about the dates when Dr. Kavaler had worked at the Lee Avenue clinic. However, the record clearly establishes that she was convinced that her testimony on this point was incorrect. At the hearing, she repeatedly reaffirmed what she had told Mr. Wilson at their meeting after she had testified, namely, that Dr. Kavaler had <u>not</u> worked at the Lee Avenue clinic during '72, '73 or '74. [App. 333-334, 339-341, 347, 356]

Dr. Alizadeh, in addition to corroborating Ms. Silva's testimony, testified that on the day they appeared as witnesses at the trial, they had signed in at the courthouse at 9:30 A.M., which meant that their meeting with Mr. Wilson may have occurred before he delivered his summation to the jury. [App. 368-369]

When Mr. Wilson took the witness stand at the post-trial hearing, he testified that he had met with Ms. Silva and Dr. Alizadeh after his summation, but before the summation of Mr. Esbitt, who was trial counsel for the defendant. Mr. Wilson stated that while he was certain he had shown Ms. Silva the transcript of her cross-examination, he could not recall whether he had shown her the transcript of her entire trial testimony. However, a memorandum, dated July 29th, prepared by Mr. Wilson, states, in pertinent part:

> "Mrs. Silva had reported that she thought she had testified falsely by saying that she saw Kavaler work at the Lee Avenue clinic in 1972 and 1973.
>
> "I showed her her testimony on cross by Esbitt (which only dealt with whether she had seen Kavaler during this period). Mrs. Silva, after reading her testimony appeared to be relieved that she had not testified falsely...." [App. 517]

Furthermore, the affidavit of John Hartwig, the Government investigator who witnessed this entire episode, states:

> "Mr. Wilson showed her Mr. Esbitt's cross examination in the transcript." [App. 315]

At no point did the prosecutor inform defense counsel, trial judge or the jury that Ms. Silva had returned to the courthouse and had asked to see the trial judge or had expressed a desire to correct her trial testimony with respect to when Dr. Kavaler had worked at the Lee Avenue clinic.

The following critical facts emerge from the record in this case:

First, Government counsel knew before the case went to the jury, that Ms. Silva had unequivocally denied that the defendant had worked at the Lee Avenue clinic during 1972 and 1973.

Second, Government counsel deliberately chose to withhold this evidence from defense counsel and the trial court.

Third, Government counsel, in the face of the witness' unequivocal denial, did not bring to the jury's attention that a material part of her testimony on direct examination was untrue.

Fourth, Government counsel, even assuming that his meeting with Ms. Silva and Dr. Alizadeh occurred after his summation,* chose not to correct his closing remarks to the jury that: "You heard the testimony of Dr. Alizadeh and his secretary, Mrs. Silva...and it was their best recollection that he [the defendant] worked there as late as December 1973...." [App. 198]

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*The record suggests that the meeting between Ms. Silva and Mr. Wilson may have occurred before Mr. Wilson's summation. On the morning of July 28th when Dr. Alizadeh and Ms. Silva met with Mr. Wilson, they signed in at the courthouse at 9:30 A.M. [App.369] The proceedings in court that morning did not commence until 10:10 A.M. [App. 191], which would have provided ample time for the meeting with Mr. Wilson prior to his summation which began minutes later. After his summation, the trial judge declared a ten minute recess at the conclusion of which defense counsel began his closing argument to the jury [Tr. 1351]. The rather short interval between the two summations, we suggest, was too brief for the meeting between the witness and the prosecutor to have occured at that point.

Despite the District Court's conclusion to the contrary,* we submit that the clear meaning of Ms. Silva's direct testimony at trial was that she had last seen the defendant treating patients, i.e., working at the Lee Avenue clinic in 1972 or 1973, which, in either case, squarely contradicted the defendant's testimony.

Before the jury retired to deliberate, Government counsel knew that this evidence was no longer true and that his closing argument to the jury based on that evidence was no longer accurate. Neither the court nor the jury nor defense counsel was apprised of the truth. Instead, the prosecutor permitted the jury to return a guilty verdict based upon evidence adduced by the Government and later discovered by it to be false and upon argument based upon such evidence.

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*Judge Brieant stated at the hearing:

> "It seems to me clear that this witness believes that she testified she saw him working there during these years in question, when it also seems clear that she never testified that, she testified she saw him there. Seeing him there is different than seeing him working there." [App. 358]

This finding, we urge, is clearly erroneous. Apart from the fact that the prosecutor admitted at the hearing that his questioning of Ms. Silva on direct was designed "to establish that he [Dr. Kavaler] was working there" [App. 384], the record is clear that during his summation he told the jury that they could find that the defendant had been working at the clinic based upon, inter alia, Ms. Silva's testimony--evidence which he alone had adduced.

We do not contend on this appeal that Ms. Silva's testimony at trial was perjurious. Though at the moment she testified at trial she honestly but mistakenly believed her testimony about when the defendant had worked at the Lee Avenue clinic, that testimony, as she later admitted, was false. Evidence may be false even though not perjurious. Hamric v. Bailey, 386 F.2d 390, 394 (4th Cir. 1967).

The applicable principle was clearly stated by the Supreme Court in Napue v. Illinois, 360 U.S. 264, 269 (1959):

> "[A] conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.... The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." (citations omitted ;(emphasis added). See also Miller v. Pate, 386 U.S. 1, 7 (1967).

The prosecutor's duty to disclose false testimony by one of its witnesses is not limited to those instances where the witness intentionally commits perjury, but encompasses the situation in this case where the prosecutor learns that the witness' testimony, although given in good faith, is untrue. This broad duty was aptly expressed by the Court of Appeals for the Third Circuit in United States v. Harris, 498 F.2d 1164, 1169 (3rd Cir.), cert. denied as Young v. United States, 419 U.S. 1069 (1974):

"We do not believe, however, that the prosecution's duty to disclose false testimony by one of its witnesses is to be narrowly and technically limited to those situations where the prosecutor knows that the witness is guilty of the crime of perjury. Regardless of the lack of intent to lie on the part of the witness, Giglio and Napue require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading. This is not to say that the prosecutor must play the role of defense counsel, and ferret out ambiguities in his witness' responses on cross-examination. However, when it should be obvious to the Government that the witness' answer, although made in good faith, is untrue, the Government's obligation to correct that statement is as compelling as it is in a situation where the Government knows that the witness is intentionally committing perjury." (emphasis added)

Here the Government, either prior to the Government's summation or prior to the defendant's summation, learned that material testimony it had presented was false. At either point in time, the case could have been reopened to allow the witness to correct her testimony. See, e.g., United States v. Jones, 480 F.2d 1135, 1137 (2nd Cir. 1973).*

*If the Government learned of this false testimony prior to its summation, it must be charged with having made use of it on summation. A prosecutor's summation which relies on factually erroneous statements known to be false constitutes reversible error. United States v. Stanley, 455 F.2d 644 (4th Cir. 1972); United States v. Achtenberg, 459 F.2d 91 (8th Cir.), cert. denied, 409 U.S. 932 (1972); Corley v. United States, 365 F.2d 884 (D.C. Cir. 1966). Even if the Government learned of this false testimony after its summation, it stood by while Dr. Kavaler's trial counsel was forced to meet it in his closing argument [App. 200-203].

At a minimum, the prosecutor was required to seek advice from the court in order to resolve the problem which he chose not to do. Cf. United States v. Deutsch, 373 F. Supp. 289, 291-92 (S.D.N.Y. 1974); United States v. Gleason, 265 F. Supp. 880, 885, et seq. (S.D.N.Y. 1967).

The prosecutor, as well as the court, has the duty to insure that the accused enjoys his right to a fair trial safeguarded by the due process clause of the Fifth Amendment. Government counsel "'has the responsibility and duty to correct what he knows to be false and elicit the truth....'" Napue v. Illinois, supra, 360 U.S. at 270 quoting People v. Savvides, 1 N.Y. 2d 554, 557, 154 N.Y.S. 2d 885, 887, 136 N.E. 2d 853, 854-55 (1956) (emphasis added).* In the present case, the prosecutor breached that duty by failing to inform the jury of the truth when it became known to him. Nor did he even advise defense counsel or the trial judge of this information. Compare United States v. Harris, supra. Furthermore, the wrong committed by the prosecutor in failing to correct Ms. Silva's misstatements was compounded

*See also, ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, §5.6:

> "(a) It is unprofessional conduct for a prosecutor knowingly to offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity." (emphasis added)

by failing to correct his own argument to the jury based on those statements.

A conviction obtained through the use of testimony known by the Government to be untrue must be vacated if

> "the false testimony could...in any reasonable likelihood have affected the judgment of the jury...[or if] the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial." Napue v. Illinois, supra, 360 U.S. at 271-272; United States v. Giglio, 405 U.S. 150, 154 (1972); United States ex rel. Washington v. Vincent, 525 F.2d 262, 267 (2nd Cir. 1975), cert. denied, 96 S. Ct. 1147 (1976).

The importance of Ms. Silva's testimony to the Government's case is clear. If the jury credited her testimony, as we must assume it did, it must have concluded that the defendant lied on the witness stand. And indeed this was the plain thrust of the prosecutor's summation quoted above. The issue created by her misstatements went directly to the heart of Dr. Kavaler's defense, his credibility and the credibility of his exhibits.* There is certainly a reasonable likelihood that her misstatements could have affected the judgment of the jury or may have

*The District Court instructed the jury that:

> "If any witness is shown to have knowingly testified falsely concerning any material matter in a trial, you have a right to distrust such witness' testimony in other particulars and you may reject all of the testimony of that witness or give such parts of it such credence as you think it deserves. An act or omission such as testifying falsely is knowingly done if it was done voluntarily and intentionally and not because of a mistake or accident or some other innocent reason." [App. 217]

had an effect on the outcome of the trial. Napue, supra; Giglio, supra. On the record before this Court, there can be no conclusion but that the defendant should receive a new trial.

CONCLUSION

The judgment of conviction should be reversed with instructions to dismiss the indictment, or, in the alternative, a new trial should be granted.

Respectfully submitted,

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-Of Counsel-

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